AZIZAH SHAIK ISMAIL & ANOR

v.

FATIMAH SHAIK ISMAIL & ANOR

FEDERAL COURT, KUALA LUMPUR
HAIDAR MOHD NOOR CJ (MALAYA)
ABDUL MALEK AHMAD FCJ
ABDUL HAMID MOHAMAD FCJ
[CRIMINAL APPEAL NO: 05-49-2002(P)]
16 SEPTEMBER 2003

CONSTITUTIONAL LAW: *Courts - Jurisdiction - Jurisdiction of High Court and Syariah Court - Determining jurisdiction of Syariah Court, correct approach - 'Subject matter' approach, whether preferable - 'Remedy' approach, whether abandoned - Federal Constitution, art. 121(1A)*

CONSTITUTIONAL LAW: *Courts - Jurisdiction of High Court - Habeas corpus - Muslim child, custody - Whether High Court has jurisdiction to hear habeas corpus application - Whether custody matter within exclusive jurisdiction of Syariah Court - Whether jurisdiction of High Court ousted despite fact that Syariah Court has no power to issue habeas corpus*

CRIMINAL PROCEDURE: *Habeas corpus - Custody of Muslim child - Whether High Court has jurisdiction to hear habeas corpus application - Whether custody matter within exclusive jurisdiction of Syariah Court - Whether jurisdiction of High Court ousted despite fact that Syariah Court has no power to issue habeas corpus - Whether right to enforce syariah custody-order through habeas corpus application before High Court*

The applicants (natural parents) had earlier obtained an order ('the custody order') from the Syariah Subordinate Court for the custody of their 14-year-old daughter ('the child') who had, since birth, been residing with the respondents (relatives). Despite the custody order, however, the child continued to live with the respondents. Aggrieved, the applicants applied to have the respondents committed to prison for the alleged breach of the custody order. The Syariah Subordinate Court, however, refused to commit the respondents, ruling that they had shown reasonable cause since the child herself had refused to return to the applicants. The applicants did not appeal this decision.

Subsequently, the applicants filed a notice of motion in the High Court for a writ of *habeas corpus* – seeking the production of the child for the hearing thereof and an order that she be returned to them on account of the custody order. At the hearing, the respondents raised the preliminary objection that the application, being one for the custody of a Muslim child, was within the exclusive jurisdiction of the syariah courts, and thus the civil courts, by reason of art. 121(1A) of the Federal Constitution ('the FC'), had no jurisdiction to entertain the same. The judicial commissioner upheld the preliminary objection and dismissed the application. The applicants appealed to the Federal Court.

Held (dismissing the appeal):
Per Abdul Hamid Mohamad FCJ

[1] Pursuant to art. 121(1A) of the FC, the High Court has no jurisdiction in respect of any matter that is within the jurisdiction of the Syariah Court. It is now beyond question that, in determining the jurisdiction of the Syariah Court, the 'subject matter' approach is preferred. (Following *Majlis Ugama Islam Pulau Pinang Dan Seberang Perai v. Shaik Zolkaffily Shaik Natar & Ors* [2003] 3 CLJ 289 FC and *Abdul Shaik Md Ibrahim & Anor v. Hussein Ibrahim & Ors* [1999] 3 CLJ 539 HC.) The 'remedy' approach as previously applied by the Supreme Court in *Majlis Agama Islam Pulau Pinang lwn. Isa Abdul Rahman & Yang Lain* [1992] 3 CLJ 1675; [1992] 1 CLJ (Rep) 201 (SC) has been jettisoned. (pp 285 f-h & 286 a-d)

[2] The 'subject matter' in the instant appeal was the custody of the Muslim child. Therefore, although the Syariah Court had no power to grant the writ of *habeas corpus* (the remedy) sought by the applicants, it still retained its jurisdiction over the whole matter respecting the custody of the child – to the exclusion of the High Court. The applicants had a right to appeal against the decision of the Syariah Subordinate Court refusing to commit the respondents; they should not have gone to the High Court in an attempt to enforce the syariah custody order. (pp 286 e-g & 287 a-b)

[Appeal dismissed; High Court had no jurisdiction to entertain application.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Pemohon-pemohon (ibubapa kandung) telah memperoleh perintah dari Mahkamah Rendah Syariah ('perintah penjagaan') bagi penjagaan anak mereka yang berumur 14 tahun ('kanak-kanak itu') yang sejak lahirnya tinggal dengan responden-responden (saudara mara). Walaupun perintah penjagaan telah dikeluarkan, kanak-kanak itu masih lagi tinggal dengan responden-responden. Merasa terkilan, perayu-perayu memohon supaya responden-responden dihukum penjara kerana melanggar perintah penjagaan. Mahkamah Rendah Syariah, bagaimanapun, enggan memenjarakan responden-responden, atas alasan bahawa mereka telah menunjukkan sebab-sebab munasabah oleh kerana kanak-kanak itu sendiri yang tidak mahu balik kepada perayu-perayu. Perayu-perayu tidak merayu terhadap keputusan ini.

Perayu-perayu kemudian memfail notis usul di Mahkamah Tinggi bagi writ *habeas corpus* – memohon supaya kanak-kanak itu dikemukakan bagi tujuan pendengaran writ tersebut serta perintah supaya beliau dipulangkan kepada mereka ekoran perintah penjagaan yang diperolehi mereka. Di pendengaran, responden-responden membangkitkan bantahan awal bahawa permohonan, yang merupakan permohonan untuk penjagaan seorang kanak-kanak Islam, termasuk dalam bidangkuasa khusus mahkamah syariah, dan mahkamah sivil, bersebabkan fasal 121(1A) Perlembagaan Persekutuan ('PP'), tidak berbidangkuasa untuk melayaninya. Bantahan awal telah diterima oleh pesuruhjaya kehakiman sekaligus menolak permohonan. Pemohon-pemohon merayu ke Mahkamah Persekutuan.

Diputuskan (menolak rayuan):
Oleh Abdul Hamid Mohamad HMP

[1] Berdasarkan fasal 121(1A) PP, Mahkamah Tinggi tidak mempunyai bidangkuasa atas apa-apa perkara yang termasuk dalam bidangkuasa Mahkamah Syariah. Ianya sudah tidak boleh dipertikaikan lagi bahawa, dalam menentukan bidangkuasa Mahkamah Syariah, pendekatan 'halperkara' adalah diutamakan. (Mengikuti *Majlis Ugama Islam Pulau Pinang Dan Seberang Perai v. Shaik Zolkaffily Shaik Natar & Ors* [2003] 3 CLJ 289 FC dan *Abdul Shaik Md Ibrahim & Anor v. Hussein Ibrahim & Ors* [1999] 3 CLJ 539 HC). Pendekatan 'remedi' sepertimana yang diterimapakai oleh Mahkamah Agung dalam *Majlis Agama Islam Pulau Pinang lwn. Isa Abdul Rahman & Yang Lain* [1992] 3 CLJ 1675; [1992] 1 CLJ (Rep) 201 (SC) sudah pun ditolak.

[2] 'Hal perkara' dalam rayuan semasa adalah penjagaan seorang kanak-kanak Islam. Oleh itu, walaupun Mahkamah Syariah tiada kuasa untuk mengeluarkan writ *habeas corpus* (remedi) yang dipohon oleh pemohon-pemohon, ia masih mengekalkan bidangkuasanya terhadap perkara keseluruhan berkaitan penjagaan kanak-kanak itu – dengan meminggirkan Mahkamah Tinggi darinya. Pemohon-pemohon berhak untuk merayu terhadap keputusan Mahkamah Rendah Syariah kerana enggan memenjarakan responden-responden; mereka tidak seharusnya pergi ke Mahkamah Tinggi dalam usaha untuk melaksanakan perintah penjagaan syariah.

Rayuan ditolak; Mahkamah Tinggi tiada bidangkuasa untuk melayan permohonan.]

Case(s) referred to:

Abdul Shaik Md Ibrahim & Anor v. Hussein Ibrahim & Ors [1999] 3 CLJ 539 HC ***(foll)***

Majlis Agama Islam Pulau Pinang lwn. Isa Abdul Rahman [1992] 3 CLJ 1675; [1992] 1 CLJ (Rep) 201 SC ***(ovrd)***

Majlis Ugama Islam Pulau Pinang dan Seberang Perai v. Shaik Zolkaffily Shaik Natar & Ors [2003] 3 CLJ 289 FC ***(foll)***

Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor [1999] 1 CLJ 481 CA ***(refd)***

Legislation referred to:

Federal Constitution, art. 121(1A)

For the applicants/appellants - Darshan Singh Khaira; M/s Darshan Singh & Co

For the respondents - Ahmad Munawir Abd Aziz; M/s Lim Kean Siew & Co

Reported by Gan Peng Chiang

JUDGMENT

Abdul Hamid Mohamad FCJ:

The appellants before us are husband and wife. So are the respondents. The first appellant and the first respondent are sisters. The appellants are the natural parents of Nazirah, the child in question. Due to the first appellant's ill-health, soon after Nazirah was born, she was given to the first respondent to be taken care of. That was in December 1987. However, in September 2000, the appellants filed a summons in Syariah Subordinate Court at Georgetown for an order of custody of the child. The respondents did not

object to the summons. The Syariah Court gave the appellants the custody of the child until she reaches the age of 16 years and thereafter to be returned to the respondents. The child, however, later on went back to live with the respondents. The respondents refused to return the child to the appellants. On 21 November 2000, the appellants applied in the same Syariah Court for an order that the respondents be committed to prison for breaching the custody order. However, on 4 May 2001 the learned Syariah Court Judge dismissed the application as he found that the respondents had shown reasonable cause why they should not be committed to prison. The appellants did not appeal against that order and the child continued to live with the respondents.

On 12 December 2001, the appellants filed a notice of motion praying for the issue of a writ of *habeas corpus* against the respondents for them to hand over the child to the appellants.

The learned Judicial Commissioner dismissed the application on the preliminary issue that the High Court had no jurisdiction over the matter. The appellants appealed to this court. We dismissed the appeal and we now give our reasons.

Learned counsel for the appellants argued that as the Syariah Courts had no jurisdiction to issue the writ of *habeas corpus*, therefore the civil court had the jurisdiction. He relied on *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 CLJ 481 (CA).

This appeal has again raised the question of jurisdiction of the Syariah Court and the High Court. If the Syariah Court has jurisdiction over the matter, the High Court does not have jurisdiction over it – art. 121(1A), Federal Constitution. That calls for the determination of the approach that the court should take in determining the jurisdiction of the Syariah Court.

This court has very recently decided on this point in *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v. Shaik Zolkaffily bin Shaik Natar & 2 Ors*. [2003] 3 CLJ 289. In that case the subject matter was the adjudication and administration of the will of a deceased Muslim, even though the respondents (plaintiffs in the High Court) had prayed for remedies of a declaration that the land in question be surrendered to the estate of Shaik Eusoff bin Shaik Latiff, deceased, a declaration that the land in question be vested upon the respondents as executors of the deceased's estate and for an account and, in the alternative, the respondents prayed for damages and an injunction.

Haidar Mohd. Noor CJ Malaya (delivering the judgment of the court) surveyed the earlier judgments of this court, the Supreme Court as well as of the High Court and concluded:

> We respectfully agree with Abdul Hamid Mohamad J. that Isa Abdul Rahman cannot be supported.

It should be noted that "Isa Abdul Rahman" is the case of *Majlis Agama Islam Pulau Pinang lwn. Isa Abdul Rahman* [1992] 3 CLJ 1675; [1992] 1 CLJ (Rep) 201 (SC). In that case, even though the land and mosque in issue were a "wakaf am", the Supreme Court held that since the real order asked for by the respondents was a perpetual injunction to restrain the appellant or its agents from demolishing the said mosque and to restrain the appellant from taking any preliminary steps to demolish the mosque and erect a commercial building on the site, and since the Syariah Courts did not have jurisdiction to issue an injunction, therefore the High Court had jurisdiction over the suit. This approach is what has become known as "the remedy approach". Secondly, the decision of Abdul Hamid Mohamad J referred to in the judgment of Haidar Mohd. Noor CJ (Malaya) refers to the case of *Abdul Shaik bin Md Ibrahim & Anor v. Hussein bin Ibrahim & Ors*. [1999] 3 CLJ 539 (HC) which adopted the "subject matter" approach.

Therefore, this court has put to rest that the subject matter approach should be adopted.

In this case, there is no doubt that the subject matter of the case is the custody of the child. That clearly falls with the jurisdiction of the Syariah Court. Even learned counsel for the appellants did not dispute that. His argument was that since the Syariah Court had no jurisdiction to issue the writ of *habeas corpus*, the civil court had the jurisdiction to issue the same in this case. The short answer to that argument is that *habeas corpus* is the remedy sought and not the subject matter of the case.

Since the subject matter in question is the custody of the child and since that is clearly within the jurisdiction of the Syariah Court, by virtue of the provisions of art. 121(1A) of the Federal Constitution, the High Court has no jurisdiction over the matter.

The appellants had a right of appeal against the order of the Syariah Court dated 4 May 2001, but failed to exercise that right. For reasons best known to them they went to the High Court to get their remedy, which, in our view, is not available to them. They h ad, in fact, gone to the High Court to enforce an order of the Syariah Court, by way of a writ of *habeas corpus*. The High Court clearly has no jurisdiction to entertain the application. The learned Judicial Commissioner was right in her judgment. For these reasons, we dismissed the appeal.